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NO. 85-1088

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

ALAN WOODS AND CARA WOODS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

With consent of the parties, the Association of Southern California Defense Counsel respectfully submits this brief as amicus curiae in support of Petitioner.

INTEREST OF AMICUS CURIAE

Amicus curiae, the Association of Southern California Defense Counsel, represents approximately 1800 attorneys in Southern California who regularly represent the interests of defendants in tort litigation, usually at the request of the defendant's insurer. Its members are vitally interested in the question whether a state may constitutionally impose a penalty against a judgment debtor for pursuing an appeal where, regardless of the substantiality of the issues raised on appeal and the defendant's good faith, imposition of the penalty follows automatically if the appeal is lost.

In the present case, the constitutionality of Alabama's automatic penalty against an unsuccessful defendant-appellant has been challenged by petitioner on equal protection and due process grounds. We urge this Court to consider another significant constitutional problem, namely, the seriously chilling effect that penalty will have on the exercise of a judgment debtor's First Amendment right to petition the courts for redress of grievances by filing and prosecuting an appeal.

As attorneys who regularly represent judgment debtors, the members of amicus curiae are acutely aware of the chilling effect automatic or arbitrary sanctions, such as the one here involved, have and are likely to have on their clients' legitimate exercise of their First Amendment rights. The Alabama penalty not only adversely impacts the rights of individual defendants to seek reversal of erroneous judgments, it also inhibits the collective rights of defendants to participate fully in the judicial process and the resulting body of judge-made law it produces.

Finally we note the Alabama automatic fine is but one of a number of obstacles which, with growing frequency and

severity, are being placed in the path of litigants who legitimately wish to seek appellate review of adverse judgments. There is an urgent need for articulation and reaffirmation of the First Amendment rights of litigants to seek reasonable and legitimate redress in the courts without fear of harsh and arbitrary sanctions if they fail.

SUMMARY OF ARGUMENT

The First Amendment protects the right to petition the government for redress of grievances. (*United Mine Workers of America v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967).) Free access to the courts is an important aspect of this fundamental right. By imposing an automatic ten percent penalty upon all judgment debtors who appeal and lose, section 12-22-72, Code of Alabama (1975), necessarily has a chilling effect upon that First Amendment right. There are three aspects to the problem. First, the First Amendment protects the rights of individual defendants to seek appellate review of erroneous judgments. Next, the First Amendment protects the collective right of defendants to participate fully in the appellate, common-law process by which the judiciary exercises its policy-making, law-creating function. This includes the right of defendants to select and initiate cases for appellate review. Finally, Alabama's automatic penalty operates with particular severity upon insurers, who are often under a legal duty to their insureds to seek appellate relief, yet at the same time face a variety of sanctions if they do so unsuccessfully.

Given the constitutional basis of defendant's rights, the Alabama statute can be upheld only in the event of a compelling state interest and the absence of less invasive alternatives to achieve that interest. (*Buckley v. Valeo*, 424 U.S. 1, 25 (1976).) No such interest can be shown. Further,

other more discriminating and far less drastic measures are available to discourage the filing of meritless appeals. (See *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) ["[E]ven if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights"].) At the very least, the First Amendment requires that a distinction be drawn between legitimate and frivolous appeals and that adequate criteria be required to distinguish between them. The Alabama statute does neither.

ARGUMENT

I.

SECTION 12-22-72, CODE OF ALABAMA, IMPERMISSIBLY IMPINGES UPON THE CONSTITUTIONAL RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

The right to petition the government for a redress of grievances under the First Amendment is "among the most precious of the liberties safeguarded by the Bill of Rights." (*United Mine Workers of America v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967).) Free access to the courts is an important aspect of that right. (*N.A.A.C.P. v. Button*, 371 U.S. 415, 430 (1963) ["[U]nder the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances"]; *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 744 (1983) ["The right to litigate is an important one. . . "

The First Amendment protection must be afforded if there is "any realistic chance that the [parties'] legal theory might be adopted." (*Id.*, at 747.)]; *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 7 (1964).)

The right to petition for a redress of grievances through resort to the courts is protected by the First Amendment even where the controversy is between private parties. (*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ["[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors."]; *United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. at 223 ["[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political."]

Few liberties have been more zealously guarded than the right to protect one's property in a court of law. This Court has recognized that a person cannot be deprived of his property without an opportunity to defend "at a meaningful time and in a meaningful manner." (*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).)

Section 12-22-72 impinges upon the First Amendment right to petition for a redress of grievances through the courts in the most direct fashion imaginable: It imposes a ten percent penalty upon judgment debtors for their mere exercise of one significant aspect of that right, the unsuccessful pursuit of an appeal. [1] Imposition of the

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[1] We recognize a state need not provide a system of appellate review as a matter of right in the first instance. (*McKane v. Durston*, 153 U.S.

penalty is not reserved for appeals found to be frivolous or to have been pursued in bad faith; its sanction falls equally upon judgment debtor-appellants whose unsuccessful appeals presented substantial issues and were entirely legitimate by any reasonable criteria. Indeed, *Aetna Life Insurance Co. v. Lavoie*, No. 84-1601, recently decided by this Court on April 22, 1986, provides a dramatic example of the statute's impact. Aetna appealed a judgment entered against it for $3,501,650.22. The judgment was affirmed by the Supreme Court of Alabama and the penalty amounting to $350,165.00 for pursuing the appeal was automatically assessed against Aetna. The appeal was manifestly meritorious. Aetna lost in the Alabama Supreme Court by a vote of 5-4. It prevailed in this Court by a vote of 8-0.[2]

684, 6 (1894).) However, "it is now fundamental that, once established, [appellate review] must be kept free of unreasonable distinctions that can only impede open and equal access to the courts." (*Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).) Accord: *Evitts v. Lucey*, ___U.S.___, 53 U.S.L.W. 4101, 4105 (1985) ["[W]hen a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution. . . ."]; *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2nd Cir. 1986).)

[2] Under the "sham" exception to the First Amendment right to petition for a redress of grievances, there is no constitutional protection for activity designed to injure a third party rather than obtain governmental action. (See *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. at 743 ["Just as false statements are not immunized by the First Amendment right to freedom of speech . . . baseless litigation is not immunized by the First Amendment right to petition."].) The vice of section 12-22-72, however, is that it sweeps within its ambit the most meritorious appeals together with the totally frivolous. (Cf. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731: National Labor Relations Board may not enjoin prosecution of state court action as sham if the state plaintiff is able to present the Board with evidence that his lawsuit raises genuine issues of material fact or law. (*Id.*, at 745-746.))

Because its sanction falls indiscriminately, section 12-22-72 necessarily has a chilling effect on the prosecution of appeals by those against whom money judgments have been entered. A party subjected to a substantial money judgment must consider that, no matter how substantial and significant the issues it wishes to present to an appellate court, if it fails to persuade a majority of the justices, it will be penalized severely for its efforts. The inevitable effect is to deter a substantial number of judgment debtors with legitimate grievances from pursuing their appellate remedies.

II.

BECAUSE SECTION 12-22-72 ADVERSELY IMPACTS UPON A FUNDAMENTAL CONSTITUTIONAL RIGHT, IT CAN BE JUSTIFIED ONLY BY SHOWING A COMPELLING STATE INTEREST. NONE CAN BE SHOWN.

First Amendment rights are basic and lie at the foundation of a free society. (*Buckley v. Valeo*, 424 U.S. at 25.) Accordingly, governmental action that has the effect of curtailing those rights is subject to the strictest scrutiny and can be justified only if the state can show a compelling interest and employs means closely drawn to avoid unnecessary abridgment of First Amendment freedoms. (*Ibid; Shapiro v. Thompson*, 394 U.S. 618, 633-634 (1969).)

Section 12-22-72 cannot be justified by reference to a compelling state interest. Indeed, it is difficult to identify any "state interest" served by section 12-22-72. The Supreme Court of Alabama struggled to identify any purpose. For example, in *Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934), the court observed that, while it had previously stated section 12-22-72 was intended "to penalize frivolous or delay appeals," it had not intended in that prior case to suggest "such was its only purpose." But *Snellings* fails to suggest any other purpose that might be served by the statute.

If the purpose of the statute is to discourage frivolous appeals, that purpose can be accomplished in a far less draconian fashion by legislation more closely drawn to avoid abridgment of First Amendment rights. Indeed, rule 38, Ala.R.App.P. provides that all appellants who take frivolous appeals may be appropriately penalized after a judicial determination that the appeal was frivolous. Thus, if the purpose of section 12-22-72 is to deter frivolous appeals, it is redundant as well as overbroad.

Similarly, if its purpose is to compensate the judgment creditor for the loss of the use of its money during the pendency of the appeal, it is once again redundant and unnecessary. Rule 37, Ala.R.App.P., and section 8-8-10, Code of Alabama, provide interest is assessed at the rate of twelve percent per annum against an appellant if a money judgment is affirmed on appeal.

III.

BY DETERRING APPEALS BY JUDGMENT DEBTORS, SECTION 12-22-72 ADVERSELY AFFECTS THE APPELLATE COURTS' ABILITY TO PERFORM THEIR POLICY MAKING FUNCTION.

Until now, we have focused on the significance of access to the appellate courts from the standpoint of the individual civil defendant seeking to protect an interest in property. But the right of access to the courts also can and should be viewed from an institutional perspective. (Cf. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ["In the first place, such a holding (that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws) would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives"].)

From an institutional perspective, public policy considerations militate against statutes like section 12-22-72 because they profoundly inhibit access to the appellate courts for a major class of litigants. The appellate courts provide a major forum for the exchange of views on matters of public importance and they exercise a powerful voice in shaping the law. They are a vitally important forum for the airing and resolution of issues of public policy.

> "Appellate courts serve two quite different functions: First, appellate courts review the trial record for error in the particular case. We can call this the review for correctness. Second, appellate courts use the cases before them as vehicles for stating and applying constitutional principles, for authoritatively interpreting statutes, for formulating and expressing policy on legal issues of system-wide concern, for developing the common law, and for supervising each level of the system below them. We can call the second set of tasks the institutional functions — the business of Government." (Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System* 44 S.Cal.L.Rev. 901, 906-907 (1971).)

Of particular significance to this case is the appellate courts' responsibility for shaping common law principles in the field of tort law.

Unlike the executive and legislative branches, the appellate courts cannot initiate action but must wait for litigants to request appellate review. As the California Supreme Court put it in *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382, 394, 525 P.2d 669, 115 Cal.Rptr. 765 (1974), appellate courts perform their important institutional functions by "adjudicating on a regular basis the *rich variety* of individual cases brought before them." (Emphasis added.) By deterring appeals by judgment debtors, section 12-22-72 necessarily limits the variety of individual cases brought before the appellate courts after judgment. In this context, the common law becomes diet-deficient, nurtured only by cases and issues presented by plaintiffs. This is particularly important in the rapidly evolving area of tort law. The appellate courts cannot perform their important

institutional function without a steady flow of appeals initiated by all sides. They should hear from defendants as regularly as they do from plaintiffs. As the California Supreme Court stated in *In re Marriage of Flaherty*, 31 Cal.3d 637, 648, 646 P.2d 179, 183 Cal.Rptr. 508 (1982): " 'Free access to the courts is an important and valuable aspect of an effective system of jurisprudence. . . .' "

IV.

THE IMPOSITION OF AN AUTOMATIC PENALTY FOR PURSUIT OF AN UNSUCCESSFUL APPEAL POSES UNIQUE PROBLEMS WHERE THE JUDGMENT DEBTOR IS DEFENDED BY A LIABILITY INSURER.

Imposition of an automatic penalty for an unsuccessful appeal poses unique problems where the judgment debtor is defended by a liability insurer. The onus of an indiscriminate fine is magnified because an insurer in many instances has a legal obligation to appeal a judgment against its insured.

Under the broad "duty to defend" clause in most liability insurance policies, an insurer "bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." (*Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 276-277, 419 P.2d 168, 54 Cal.Rptr. 104 (1966).) The duty to defend does not end once the jury renders its verdict. Quite the contrary. An insurer's contractual duty to defend can obligate it to bring an appeal where the insurer defends through trial, the insured requests an appeal because a portion of the judgment is uninsured, and there are reasonable grounds for appeal. (E.g., *Cathay Mortuary (Wah Sang) Inc. v. United Pacific*

Ins., 582 F.Supp. 650 (N.D. Cal. 1984); *Arenson v. National Auto. & Cas. Ins. Co.*, 48 Cal.2d 528, 536, 310 P.2d 961 (1957); *Cornwell v. Safeco Ins. Co. of America*, 346 N.Y.S.2d 59, 71-72 (App.Div. 1973).)[3] "Reasonable grounds for appeal" exist whenever the issues are "debatable" and "advanced in good faith." (*Arenson v. National Auto & Cas. Co.*, 48 Cal.2d at 538.)[4]

Therefore, if (1) there is a broad duty to defend in the policy, (2) a portion of the judgment is or may be uninsured, (3) the insured desires an appeal, and (4) there are reasonable grounds for an appeal, then the insurer in many cases is *obligated by law* to bring an appeal. However, its legal duty to appeal will not save the insurer from the automatic ten percent penalty under section 12-22-72, even if all four criteria are met.

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[3] The cases on an insurer's duty to appeal are collected in: 7C Appleman, *Insurance Law and Practice*, § 4688, p. 199 (Berdal ed. 1979); 14 *Couch on Insurance 2d*, § 51:38, p. 448 (Rev. ed. 1982); Long, *The Law of Liability Insurance*, § 5.57, p. 5-437 (1983); Windt, *Insurance Claims and Disputes*, § 4.15, p. 131 (1982); Magarick, *Excess Liability*, § 11.30, p. 208 (2d ed. 1982); Annotation, *Duty of Liability Insurer to Appeal*, 69 A.L.R.2d 690 (1960); and 44 Am Jur.2d Insurance, § 1407, p. 347.

[4] Even where the entire judgment is covered by the policy, the insured may have a substantial interest that would be served by an appeal. For example, if the insured is a professional person (e.g., a doctor or lawyer), an outstanding judgment may adversely affect his or her reputation or livelihood. For this reason, policies issued to such insureds often preclude the carrier from settling without the consent of the insured and require it to prosecute an appeal on the insured's behalf. In the case of doctors and health care facilities, statutes often reinforce this policy term. (See, e.g., California Bus. & Prof. Code § 801, subd. (c); California Health & Saf. Code § 1306.)

CONCLUSION

An appeal is a classic example of a petition for a redress of grievances against the government, namely the judiciary, as the appellant must argue that it did not receive a fair and proper trial in the lower court, the governmental entity that entered judgment against it. If a nonfrivolous appeal can lead to an automatic penalty, often for hundreds of thousands of dollars, simply because it was unsuccessful, the First Amendment rights of appellants will be seriously chilled. Individual appellants, however, are not the only ones to suffer from a rule indiscriminately penalizing unsuccessful appeals by judgment debtors. The inevitable result of the rule is to limit the number and types of appeals presented to the appellate courts, thereby inhibiting and skewing their institutional, policy making function. Finally, an automatic fine impacts with particular severity upon insurers, who are often under a contractual duty to pursue an appeal on behalf of their insured.

Accordingly, the ten percent damage provision of section 12-22-72, Code of Alabama should be declared unconstitutional as in violation of the First Amendment right to petition the government for a redress of grievances.

Respectfully submitted,

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